Accordingly, the propriety of its action will not be reviewed, any more than would the commitment for contempt by any other court of general jurisdiction under similar circumstances.[14]

Very probably too, when conducting an inquiry preliminary to legislation or to any other act within their constitutional powers, Congress may punish the refusal of a witness to answer relevant questions.[15] The Constitution intends that the functions of Congress be intelligently carried out, and, accordingly, information must be obtained before all the facts necessary to the determination of the propriety of an act can be before them. To gain such knowledge, third parties must, at times, be questioned, and if they cannot be compelled to answer, the ability to legislate efficiently is tremendously diminished; oftentimes it would be impossible to get vital information. The power to legislate does, then, by necessary implication include the power to examine witnesses and to compel them to respond by contempt proceedings. Congressional power to punish contempt must at least go so far.

VALIDITY OF A STATUTE AS A QUESTION FOR AN ADMINISTRATIVE COMMISSION. — The point that a public service commission is not competent to consider the constitutionality of a statute which it has been directed to enforce has been the occasion for a virtual unanimity of opinion on the part of these administrative bodies and courts far and wide.[1] The question, however, has in each instance been disposed of in summary fashion, although the answer seems by no means correspondingly obvious.

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bribery and corruption, or attempt, by letter to induce the commission of either, as the inhabitant of any other section of the Union." Anderson *v.* Dunn, 6 Wheat. (U. S.) 204, 234, *per* Mr. Justice Johnson.

It is to be further noted that in the case under discussion the accused came of his own free will before the committee investigating the alleged contempt, though the warrant of arrest was probably served in New York.

[14] " . . . authorities . . . show conclusively that the senate of the United States has power to punish for contempts of its authority in cases of which it has jurisdiction; that every court, including the senate and house of representatives, is the sole judge of its own contempts; and that in case of the commitment for contempt in such a case, no other court can have the right to inquire into the correctness or propriety of the commitment; or to discharge the prisoner on *habeas corpus;* or that the warrant of commitment need not set forth the particular facts which constitute the alleged contempt." *Ex parte* Nugent, 18 Fed. Cas. 471, 481, *per* Chief Judge Cranch. See CUSHING, LEGISLATIVE ASSEMBLIES, 2 ed., § 649.

Cf. Burdett *v.* Abbot, 14 East 1, 149, and Case of Sheriff of Middlesex, 11 A. & E. 273, 289, where it is stated that if the warrant states that the prisoner was committed for something other than a contempt or which could not be a contempt, then the court will act as justice requires. A general warrant committing for contempt is however held non-reviewable.

[15] See *In re* Chapman, 166 U. S. 661, 671. See COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 193.

[1] Director of Posts *v.* Inchausti & Co., P. U. R. 1916 E, 849; *Re* Marin Municipal Water Dist., P. U. R. 1915 C, 433; Scobey *v.* Great Northern R. Co., P. U. R. 1915 A, 950; *Re* Cochise County, P. U. R. 1915 D, 220; *Re* Marysville Light & Water Co., P. U. R. 1915 D, 374; State *ex rel.* Missouri Southern R. Co. *v.* Public Service Comm., 259 Mo. 704, 727, 168 S. W. 1156. In Knott *v.* Southwestern Tel. & Tel. Co., P. U. R. 1915 E, 963, 985, the Commission at one point expressly denies its power to decide a question of the constitutionality of a statute, proceeding later, however, to consider such a question.

At the outset it is to be noticed that the practice of the judiciary to declare statutes unconstitutional is not the necessary concomitant of a written constitution,[2] but certainly it is much too late to question the settled existence of this power in our American courts.[3] Its tremendous importance and the danger of injudicious exercise, however, have found recognition in the chain of safeguards with which the courts have surrounded it. For example, there is the well-settled principle that a constitutional point, though squarely raised, will not be determined if the case can be disposed of on another ground;[4] the rule that a statute is not to be declared void unless the violation of the Constitution is so manifest as to leave no room for reasonable doubt;[5] and finally the rule that no one is permitted to attack a statute who is not directly affected by its operation.[6]

This last-named rule has had its effect upon the relation of executive officials to statutes the validity of which is in question. In general, it may be said that it is the duty of a ministerial officer to assume that the legislature has not exceeded its authority and act accordingly, since in a *mandamus* proceeding he will not, by the weight of authority, be permitted to defend on the ground of the unconstitutionality of the statute, his interest being conceived of as too remote.[7] To allow every petty official to set himself up as a judge would obviously be a serious menace to any orderly scheme of government.[8] On the other hand, one is confronted with the oath to support the Constitution required of public officers. But since the Constitution needs for its support the expeditious enforcement of the laws quite as much as the non-enforcement of what are not laws, query whether in the long run it will not be better served by unhesitating obedience to the legislature rather than recalcitrant tactics on the part of officials. The answer depends to some extent

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[2] See "The Origin and Scope of the American Doctrine of Constitutional Law" by the late James B. Thayer, in 7 HARV. L. REV. 129, 130. See also 9 HARV. L. REV. 277.

[3] The leading case is Marbury *v.* Madison, 1 Cranch (U. S.) 137.

[4] *Ex parte* Randolph, 2 Brock. (U. S.) 447.

[5] Comm. *v.* Smith, 4 Bin. (Pa.) 117; So. Morgantown *v.* Morgantown, 49 W. Va. 729, 40 S. E. 15.

[6] Williamstown *v.* Carlton, 51 Me. 449; Supervisors *v.* Stanley, 105 U. S. 305; Sinclair *v.* Jackson, 8 Cow. (N. Y.) 543; Comm. *v.* Wright, 79 Ky. 22.

[7] Ames *v.* People, 26 Colo. 83, 56 Pac. 656; State *ex rel.* Cruce *v.* Cease, 28 Okla. 271, 114 Pac. 251; Thoreson *v.* State Board of Examiners, 19 Utah 18, 57 Pac. 175; s. c. 21 Utah 187, 60 Pac. 982; Franklin County Comm'rs *v.* State *ex rel.* Patton, 24 Fla. 55, 3 So. 47; Comm. *v.* James, 135 Pa. 480, 19 Atl. 950; Smyth *v.* Titcomb, 31 Me. 272; People *ex rel.* Atty. Gen. *v.* Salomon, 54 Ill. 39; State *ex rel.* New Orleans Canal, etc. Co. *v.* Heard, 47 La. Ann. 1679, 18 So. 746. The leading case *contra* is Van Horn *v.* State *ex rel.* Abbott, 46 Neb. 62, 64 N. W. 365.

An exception, however, is generally made where the officer defending will incur liability by acting under the void statute, as in the case of an auditor who is compelled to pay out money. Denman *v.* Broderick, 111 Cal. 96, 43 Pac. 516. But see Smyth *v.* Titcomb, 31 Me. 272, 286. The acts of a commission, however, would not, it is submitted, be likely to be of this character.

But even a state auditor or similar officer would have no appeal to the federal courts, although it is the federal Constitution which the statute in question is claimed to contravene. See Braxton County Court *v.* West Virginia, 208 U. S. 192, discussed in 21 HARV. L. REV. 438. See also Smith *v.* Indiana, 191 U. S. 138.

[8] See People *ex rel.* Atty. Gen. *v.* Salomon, 54 Ill. 39, 46.

at least on the servant's chances of arriving at a correct conclusion on the question of constitutionality.[9]

In addition to courts and executive officials, there is another type of governmental agency to which conceivably a question of constitutionality might be presented — namely, an inferior legislative body as, for example, a municipal corporation.[10] The course of action which such an organ should follow seems clear. The judicial and executive departments enjoy the distinction of being coördinate with the legislature; whereas this body is plainly subordinate, a creature of the legislature purely and simply. The legislature's mandate should be its gospel.[11]

Having examined the relation of the executive, judicial, and legislative branches of the government toward questions of the validity of statutes, the writer's task now becomes a mere matter of indexing a commission in our tripartite scheme of government — does a commission function as a legislature, an executive, or a court? The line of demarcation between the first two cannot be drawn with chiseled nicety; one must be content with perceiving that a commission more nearly resembles an executive body. But for the purposes of our immediate problem it is unnecessary to pursue the inquiry thus far; we may stop when we have negatived the likelihood of a commission's being a judicial body. Some of the more important reasons may here be noticed. The personnel of a commission seems almost conclusive against its judicial character, composed entirely as it usually may be of individuals untrained in the law.[12] From this fact one may argue directly, that is, aside from where a commission stands in the division of powers, against the propriety of its sitting on questions of constitutionality. A commission frequently appears itself as a plaintiff, or defendant — rather a strange rôle for a court.[13] Furthermore its hearings are not conducted according to the technical rules of evidence.[14] Both on principle and by the great preponderance of authority[15] a commission is not to be classified as a court, and since of the three so-called coördinate departments of government courts alone are entitled to declare statutes unconstitutional, it follows that commissions do not possess this power.

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[9] An examination of the decisions handed down by the Supreme Court of the United States between the dates October 13, 1915, and June 12, 1916, in cases involving the validity of statutes, disclosed the fact that in fifty out of fifty-nine instances the statute was held to be constitutional.

[10] The notion that a legislature can under no circumstances delegate its powers has been abandoned. See GOODNOW, PRINCIPLES OF ADMINISTRATIVE LAW, 41. See also 21 HARV. L. REV. 205.

[11] A state legislature would seem to occupy a similar position toward the state constitution where doubts as to its conformity to the federal Constitution are raised.

[12] The Interstate Commerce Act does not require the appointment of lawyers to the Commission. The Commission is at present composed of four lawyers and three non-lawyers.

[13] See Peavey *v.* Union Pacific R. Co., 176 Fed. 409.

[14] See 29 HARV. L. REV. 208.

[15] Stone *v.* Farmers' Loan & Trust Co., 116 U. S. 307, 336; Kentucky & I. Bridge Co. *v.* Louisville & N. R. Co., 37 Fed. 567; Interstate Commerce Comm. *v.* Cincinnati, U. O. & T. P. R. Co., 64 Fed. 981; Southern R. Co. *v.* Railroad Comm., 172 Ind. 113, 87 N. E. 966; State *ex rel.* Taylor *v.* Missouri Pacific R. Co., 76 Kan. 467, 92 Pac. 606. WYMAN, PUBLIC SERVICE CORPORATIONS, 1232, and 25 HARV. L. REV. 704. *Cf.* People *ex rel.* Railroad *v.* Willcox, 194 N. Y. 383, 87 N. E. 517.